Tan Gaik Leong (t/a Juruukur Berjasa) & Anor v Berjasa Information System Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–228 OF 2007 AND W-02–229 OF 2007
ZAINUN ALI, RAMLY ALI AND KANG HWEE GEE JJCA
25 MAY 2012

Civil Procedure — Question of fact — Appeal — Insufficient judicial appreciation of evidence and circumstances — Whether desirable to disturb findings of court below — Circumstances when appellate court may intervene

Contract — Service contract — Termination — Failure to complete working system within 12 months — Whether non-completion of contract witihin 12 months was in issue

The first defendant was a qualified surveyor and sole proprietor of Jurukur Berjasa. In 1990, the Lembaga Air Perak ('LAP') made a proposal to the first defendant to develop a digital mapping system software ('the DMS software') for LAP ('the LAP project'). Pursuant to the said proposal, the first defendant together with one Aw Kang Koy (KK Aw) incorporated the plaintiff company where both of them were directors and shareholders of the plaintiff. From its inception, the digital mapping system software ('the DMS software') which is the major component of the LAP project, carried a notice ('the copyright notice') which was displayed on every occasion that the DMS software was used. The said copyright notice was displayed for 2 ½ years without any objection from either the first defendant or the LAP. Subsequently however, the first defendant demanded the plaintiff company to remove their name from the said copyright notice. As the plaintiff had refused, the first defendant terminated the plaintiff company's services in connection with the LAP project. The plaintiff company then claimed a sum of RM346,722.85 against the first defendant, being monies earned by the plaintiff company in the LAP project, pursuant to the assignment agreement, which monies were received by the first defendant for and to the use of the plaintiff company. The plaintiff also sought declaratory relief against the defendants for copyright of the DMS system. The defendant however, counterclaimed that the plaintiff failed to complete the working system within 12 months pursuant to cl 15 of the LAP contract. The High Court had allowed the plaintiff's claim and the defendant's counterclaim on liabilities and damages to be assessed. Against the said decision the parties appealed to this court which turned upon a question of fact. The appellant's grounds of appeal, inter alia, were that there was insufficient judicial appreciation by the learned trial judge of the evidence and

circumstances placed before him; that the trial judge had completely overlooked the inherent probabilities of the case; that the trial judge had erred in his finding that there was a non-completion of the working system by the plaintiff within the 12 months; and that the trial judge's insufficient appreciation of the evidence before him warranted appellate intervention.

Held, dismissing the appellant's appeal with costs and dismissing the respondent's counterclaim:

(1) From the evidence adduced, the first defendant had never raised any complaint on the non-completion of the working system. The matter was in fact raised only after four years, after the termination by including it in the counterclaim. From the record, there was also no evidence that the plaintiff had refused to rectify any problem, if any (see paras 20–22).

(2) The full completion of the software could not be demanded due to the fact that KK Aw was declared *persona non grata* and that there was termination of the plaintiff's services (see para 23).

(3) The benchmark set by the expert witnesses from the programmer's point of view and the implementer's point of view were not referred to nor agreed by the parties in the LAP contract (see para 24).

(4) The contract between the appellant and respondent was wrongly terminated by the appellant on grounds which were not based on the terms of the contract. Further, the non-completion of the contract within the 12 months was not in issue. Therefore, it is deemed to have been completed, acquired and accepted by the appellant. There were no reasons to interfere with the findings of the learned High Court judge in allowing the respondent's claim (see paras 25–26).

(5) With respect to the counterclaim, the learned High Court judge had allowed the counterclaim based on the non-completion of contract by the respondent. Based on the evidence adduced, this court took the contrary position ie the counterclaim ought to be dismissed (see para 29).

[Bahasa Malaysia summary

Defendan pertama merupakan juruukur yang berkelayakan dan pemilik tunggal Jurukur Berjasa. Pada tahun 1990, Lembaga Air Perak ('LAP') mencadangkan kepada defendan pertama untuk membangunkan sistem perisian pemetaan digital ('perisian DMS') untuk LAP ('projek LAP'). Selaras dengan cadangan tersebut, defendan pertama bersama-sama dengan Aw Kang Koy ('KK Aw') memperbadankan syarikat plaintif di mana kedua-dua mereka adalah pengarah dan pemegang saham plaintif. Dari penubuhannya, sistem perisian pemetaan digital ('perisian DMS') yang merupakan komponen utama projek LAP, mempunyai suatu notis ('notis hak cipta') yang telah dipaparkan pada setiap kali perisian DMS tersebut digunakan. Notis hak cipta tersebut

telah dipaparkan untuk 2 ½ tahun tanpa apa-apa bantahan sama ada daripada defendan pertama mahu pun LAP. Walau bagaimanapun, defendan pertama menuntut syarikat plaintif untuk mengeluarkan nama mereka daripada notis hak cipta tersebut. Apabila plaintif menolak berbuat sedemikian, defendan pertama menamatkan perkhidmatan syarikat plaintif bagi projek LAP. Syarikat plaintif kemudian menuntut jumlah RM346,722,85 terhadap defendan pertama, iaitu wang yang diperolehi oleh syarikat plaintif dalam projek LAP, menurut perjanjian penyerahan, yang mana wang telah diterima oleh defendan pertama dan untuk penggunaan plaintif syarikat. Plaintif juga memohon deklarasi relief terhadap defendan bagi hak cipta sistem DMS. Defendan, walau bagaimanapun, menuntut balas bahawa plaintif gagal untuk melengkapkan sistem bekerja dalam tempoh 12 bulan menurut klausa 15 kontrak LAP. Mahkamah Tinggi membenarkan tuntutan plaintif dan tuntutan balas defendan dengan liabiliti dan kerugian untuk ditaksir. Pihak-pihak merayu kepada mahkamah ini akan keputusan tersebut yang kemudiannya bertukar menjadi persoalan fakta. Alasan perayu rayuan, antara lain, adalah terdapat kegagalan pertimbangan kehakiman yang secukupnya oleh hakim bicara akan bukti dan keadaan di hadapannya; bahawa hakim bicara telah benar-benar terlepas pandang kebarangkalian wujudnya kes tersebut; bahawa hakim perbicara telah terkhilaf dalam memutuskan bahawa terdapat ketidaklengkapan sistem bekerja oleh plaintif dalam tempoh 12 bulan; dan pertimbangan keterangan yang tidak mencukupi oleh hakim bicara yang membolehkan campur tangan rayuan.

Diputuskan, menolak rayuan perayu dengan kos dan menolak tuntutan balas responden:

(1) Berdasarkan keterangan yang dikemukakan, defendan pertama tidak pernah membangkitkan sebarang aduan mengenai ketidaklengkapan sistem bekerja. Perkara tersebut sebenarnya dibangkitkan hanya selepas empat tahun, selepas penamatan dengan memasukkannya dalam tuntutan balas itu. Daripada rekod tersebut, tiada bukti bahawa plaintif enggan untuk menyelesaikan sebarang masalah, jika ada (lihat perenggan 20–22).

(2) Kelengkapan perisian tersebut tidak boleh dituntut disebabkan berdasarkan fakta bahawa KK Aw telah diisytiharkan *persona non grata* dan bahawa terdapat penamatan perkhidmatan plaintif (lihat perenggan 23).

(3) Standard yang ditetapkan oleh saksi pakar dari sudut pandangan pakar program dan pelaksana tidak dirujuk dan tidak dipersetujui oleh pihak-pihak dalam kontrak LAP (lihat perenggan 24).

(4) Kontrak antara perayu dan responden telah ditamatkan secara salah oleh perayu atas alasan yang tidak berdasarkan terma kontrak. Seterusnya, ketidaklengkapan kontrak dalam tempoh 12 bulan bukanlah isu. Oleh

A itu, ia dianggap telah siap, telah diperolehi dan diterima oleh perayu. Tidak ada sebab untuk mengganggu dapatan hakim Mahkamah Tinggi dalam membenarkan tuntutan responden (lihat perenggan 25–26).

(5) Dengan merujuk kepada tuntutan balas tersebut, hakim Mahkamah Tinggi telah membenarkan tuntutan balas berdasarkan ketidaklengkapan kontrak oleh responden. Berdasarkan keterangan yang dikemukakan, mahkamah ini mengambil kedudukan yang berlawanan iaitu tuntutan balas tersebut seharusnya ditolak (lihat perenggan 29).]

Notes

For a case on termination, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) para 5944.

Cases referred to

Abdul Rahim Abdul Hamid and Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Eng Thye Plantations Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng [2005] 2 MLJ 1, FC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Appeal from: Suit No D42–22–1194 of 2007 (High Court, Kuala Lumpur)

Atma Singh Veriah (DR John with him) (Lim Soh & Goonting) for the appellant.
Daniel Lo (Andrew Khoo & Daniel Lo) for the respondent.

Zainun Ali (now FCJ) JCA:

[1] These two appeals are interrelated. They arose from the same action in the High Court.

[2] The High Court on 7 February 2007 made the following orders:

(a) allowed the plaintiff's claim for breach of assignment on liability; and

(b) allowed the defendant's counterclaim on liability for non-completion of the plaintiff's work pursuant to the assignment agreement. Damages to be assessed. This became the subject matter of the plaintiff's appeal in W-02–228 of 2007.

The defendant now seeks leaves to appeal against both decisions.

BACKGROUND

[3] The first defendant is a qualified surveyor and sole proprietor of Jurukur Berjasa. Lembaga Air Perak ('LAP') made a proposal to the first defendant in 1990, to develop a digital mapping system software ('the DMS software') for LAP ('the LAP project').

[4] Pursuant to the said proposal the first defendant together with one Aw Kang Koy ('KK Aw') incorporated the plaintiff company. Both of them were directors and shareholders of the plaintiff. Subsequently several events then took place as follows:

(a) the first defendant was appointed as consultant for the LAP project (via LAP's letter of 7 January 1999);

(b) the first defendant then assigned the whole project to the plaintiff. An assignment agreement was drafted the terms of which, inter alia, as follows:

  (i) apart from the surveying part, the first defendant assigned the whole project to the plaintiff; and

  (ii) the first defendant agreed to charge a 3% fee on claims made by the plaintiff;

(c) LAP was informed (via the first defendant's letter dated 12 February 1991) that the first defendant had formed a subsidiary company (ie the plaintiff) to carry out the consultancy works; and

(d) The LAP contract between the first defendant and LAP was entered into on 13 April 1991, and covered a wide range of work encompassing survey and computer software:

  (i) Clause 15 — completion of the working system within 12 months, failure of which LAP shall be entitled for liquidated ascertained damages (LAD).

[5] From its inception, the digital mapping system software (the DMS software) which is the major component of the LAP project, carried a notice (the copyright notice) which was displayed on every occasion that the DMS software was used. The notice reads:

A Digital Mapping System

For

Lembaga Air Perak

Copyright © 1990, 1991

B Berjasa Information System Sdn Bhd

and

C **[6]** The said copyright notice was displayed for 2½ years without any objection from either party (the first defendant or the LAP). However the first defendant subsequently demanded the plaintiff company remove their name from the said copyright notice vide its solicitors letter dated 4 September 1993.

D **[7]** The plaintiff company's refusal to do so was dire. It resulted in the first defendant terminating the plaintiff company's services in connection with the LAP project, vide its solicitor's letter dated 4 January 1994, evincing an intention to be no longer bound by the assignment agreement.

E **[8]** The plaintiff company responded by accepting the first defendant's repudiation of the assignment agreement but held him liable for all loss and damage suffered thereby.

F **[9]** The plaintiff company then claimed RM346,722.85 against the first defendant, being monies earned by the plaintiff company in the LAP project, pursuant to the assignment agreement, which monies were received by the first defendant for and to the use the plaintiff company.

G **[10]** It is the plaintiff company's case that first defendant failed to pay or otherwise render a true and full account to the plaintiff company for the amounts outstanding or any part thereof notwithstanding demands made by the plaintiff company, vide its letter dated 20 September 1993 and their solicitor's letters dated 23 February 1994 and 14 February 1996.

H **[11]** The plaintiff also sought declaratory relief against the defendants for copyright of the DMS system in the KL High Court (vide D5–24–80 of 1994), in that the DMS is owned by the plaintiff and it is entitled to display the said copyright notice on the DMS system.

I **[12]** The plaintiff also claims that the first defendant as a director or agent of the plaintiff, owed the plaintiff a duty to act bona fide in the interests of the plaintiff and to render a true and full account of any transaction involving the plaintiff.

THE DEFENDANT'S COUNTERCLAIM

[13] The defendant however counterclaimed that the plaintiff failed to complete the working system within 12 months. The defendant said it had to engage experts from England to rectify the works.

[14] In answer to the above, the plaintiff contended that the working system was completed within time and that the works carried out thereafter were enhancement works, which was beyond the scope of the LAP contract.

[15] The issues to be tried were briefly as follows:

(a) whether the LAP contract was assigned to the plaintiff;

(b) whether the plaintiff had completed the working system within 12 months;

(c) whether the enhancement works were part of the working system;

(d) whether the first defendant has the right to demand removal of the plaintiff's name from the copyright notice; and

(e) whether the first defendant owed to the plaintiff duties to act in the plaintiff's interests.

[16] The High Court in allowing the plaintiff's claim and the defendant's counterclaim on liabilities and damages to be assessed, made these findings:

(a) that there was no assignment of the LAP contract to the plaintiff but merely an 'allocation of a part of the intended LAP contract for performance by the plaintiff'. The plaintiff had no direct relationship with LAP. (see para 22 of grounds);

(b) that the first defendant accepted the objection made by LAP to the placement of the plaintiff's name on the copyright notice. defendant. (see para 25 of the grounds);

(c) that the plaintiff failed to provide a complete working system. Based on the expert evidence, the working system in the contract indicated the system implementation point of view and not the programmer's point of view (paras 27–29 of the grounds); and

(d) that the first defendant had accepted a contract whereby a contract where the copyright of the DMS software would belong to the LAP, but its agreement with the plaintiff did not include rights to the plaintiff's copyright. The plaintiff suffered loss and is entitled to damages.

A IN THE COURT OF APPEAL

[17] The appeal before us turns upon a question of fact. The appellant's grounds of appeal, inter alia, were that there was insufficient judicial appreciation by the learned trial judge, of the evidence of circumstances placed before him, that the trial judge had completely overlooked the inherent probabilities of the case; that the trial judge had erred in his finding that there was a non-completion of the working system by the plaintiff within the 12 months, that the trial judge's insufficient appreciation of the evidence before him warrants appellate intervention.

OUR FINDINGS

[18] After having heard submissions of both parties, we took the approach taken by most judicial appellate arbiters that it would be undesirable to disturb the findings of the court below unless it appears that those findings are clearly wrong. The following line of authorities bear this out.

(See *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng* [2005] 2 MLJ 1, FC,*China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, FC; *Abdul Rahim Abdul Hamid and Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; *Eng Thye Plantations Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26, *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395

[19] In fact an assessment of facts must be undertaken before an appellate court decides whether to intervene or resist from so doing.

GAN YOOK CHIN (P) & ANOR v LEE ING CHIN @ LEE TECK SENG [2005] 2 MLJ 1

[20] We find from the evidence adduced that the first defendant had never raised any complaint on the non-completion of the working system.

[21] The matter was in fact raised only after four years later, after the termination by including it in the counterclaim.

[22] From the record, there is also no evidence that the plaintiff had refused to rectify any problem, if any.

[23] It was also noted that full completion of the software cannot be demanded due to the fact that KK Aw was declared *persona non grata* and that there was termination of the plaintiff's services.

[24] In fact we find that the benchmark set by the expert witnesses from the programmer's point of view and the implementer's point of view were not referred to nor agreed by the parties in the LAP contract.

DECISION

[25] We are of the view that the contract between the appellant and respondent was wrongly terminated by the appellant on grounds which were not based on the terms of the contract. We are also of the view that the non-completion of the contract within the 12 months is not in issue.

[26] Therefore it is deemed to have been completed, acquired and accepted by the appellant. We therefore find no reason to interfere with the findings of the learned High Court judge in allowing the respondent's claim.

[27] We therefore dismiss the appellant's appeal in Appeal No 21(W-02–228 of 2207) with costs. Costs RM3,000.

[28] The deposit is awarded to the respondent towards costs.

[29] With respect to appeal No 22 on the list ie (W-02–229 of 2007), ie the counterclaim, it is our view that the learned High Court judge allowed the counterclaim based on the non-completion of contract by the respondent. Based on our finding, we took the contrary position ie the counterclaim ought to be dismissed based on the evidence adduced.

[30] We therefore unanimously allow the appellant's appeal with costs.

[31] Costs RM3,000.

[32] The deposit to be refunded to the appellant.

A *Appellant's appeal dismissed with costs and respondent's counterclaim dismissed.*

Reported by Ashgar Ali Ali Mohamed

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